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FILED
MAY 18 1961
JAMES R. BROWNING

In the Supreme Court

of the United States

OCTOBER TERM, 1960

No. ~~9218~~ 99

MORRISON-KNUDSEN COMPANY, INC.,

Petitioner,

v.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, U. S. Department of Labor, Bureau of Employee's Compensation, and DANA M. EMIG, for herself and on behalf of Susan Marie and Kristine Marie Emig,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5-61

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J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, U. S. Department of Labor, Bureau of Employee's Compensation, and DANA M. EMIG, for herself and on behalf of Susan Marie and Kristine Marie Emig,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the District of Idaho, Southern Division, affirming the order and award of the Deputy Commissioner of Labor awarding compensation under the Longshoremen's and Harbor Workers' Compensation Act and dismissing petitioner's petition for an injunction.

OPINIONS BELOW

The order and award of the Deputy Commissioner has not been reported but is printed in Appendix (c) hereto infra page 22.

The opinion of the District Court has not been reported but is printed in Appendix (b) hereto infra page 21.

The opinion of the Court of Appeals has not been reported and is printed in Appendix (a) hereto infra page 15.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered and filed the 20th of March, 1961.

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254 (1).

QUESTIONS PRESENTED

1. Is a party (employer) before the Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act entitled to a trial de novo as a matter of right on the question of whether the injury or death of the claimant (employee) occurred upon navigable waters of the United States under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 920 (a).

2. Are seepage waters in an unused diversion tunnel below Idaho land and constructed incident to dam con-

struction upon navigable waters, themselves navigable waters within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 903(6).

3. Assuming for the purposes of argument only, that seepage waters in an unused diversion tunnel are in fact navigable waters of the United States, is the work performed incident to preventing such seepage into the unused diversion tunnel maritime employment within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 902 (4).

STATUTES INVOLVED

Section 3(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 903(a)) provides:

> "Compensation shall be payable under this chapter in respect to disability or death of an employee *but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for disability or death through Workmen's Compensation proceedings may not validly be provided by State law.*" (Emphasis added.)

Section 2(4) of the Longshoremen's and Harbor Workers' Compensation Act 33 U.S.C.A. 902(4) provides:

> The term "employer" means an employer any of whose employees are employed in maritime employment in whole or in part, upon the navigable waters of the United States (including any drydock)."

Section 20(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 920 provides:

> "In any proceeding for the enforcement of a claim

for compensation under this chapter, it shall be presumed, in the absence of substantial evidence to the contrary (a) that the claim comes within the provisions of this chapter."

STATEMENT OF THE CASE

This action (pursuant to 33 U.S.C.A. 921 (a, b) (Section 21)) seeks to enjoin the Deputy Commissioner of the Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, United States Department of Labor, Bureau of Employee's Compensation from awarding to the widows and other beneficiaries of certain employees of Morrison-Knudsen Company, Inc., compensation benefits under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901, et seq.

Actually this action involves four deaths which gave rise to five separate proceedings under the Longshoremen's and Harbor Workers' Compensation Act by the surviving widows and other beneficiaries and pursuant to stipulation the decision in this case is to be binding on the remaining four cases, which were also appealed.

The essential facts may be summarized as follows:

Decedent Emig was an ironworker employed by Morrison-Knudsen Company, Inc. in the course of the construction of the Brownlee Dam on the Snake River between the States of Oregon and Idaho. A diversion tunnel approximately 2,550 feet long in the shape of a modified horseshoe was bored into and through the bank of the

river on the Idaho side and the tunnel was some 400 feet below the surface of the Idaho land.

The diversion tunnel was constructed in order to divert the waters of the Snake River around the area in the bed of the stream where the dam was to be constructed.

Upon the completion of the Brownlee Dam the upstream end of the diversion tunnel was permanently blocked by the lowering of large concrete gates. This allowed waters of the Snake River to back up behind the dam so that eventually there was a pool or lake behind the dam and approximately 200 feet of water over the upstream entrance to the blocked diversion tunnel.

Although the contractor, Morrison-Knudsen Company, dumped considerable material at the upstream end of the diversion tunnel, water seeped and leaked into the tunnel, requiring further action by the contractor.

In order to investigate the leakage and seepage into the tunnel four ironworkers were dispatched into the tunnel, including the decedent Emig, and they were directed to proceed into the unused tunnel from the downstream end and attach brackets to the wall at the upper end of the tunnel. The four ironworkers proceeded into the tunnel in a 16-foot boat propelled by an outboard motor and in the course of this operation were drowned when the boat upset. The seepage water was eventually pumped out of the unused diversion tunnel and the tunnel was permanently sealed with concrete plug at about half way along its length.

Morrison-Knudsen Company, Inc., pursuant to the provisions of the Idaho Workmen's Compensation Act, made certain compensation payments to the widows and other beneficiaries of the deceased ironworkers. However, the widows and other beneficiaries filed claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

The claims were heard before the Deputy Commissioner for the Fourteenth Compensation District, who filed and entered orders allowing compensation under the Act to the widows and other beneficiaries of the deceased ironworkers.

Thereafter Morrison-Knudsen Company, Inc., filed petitions for injunctions in the United States District Court for the District of Idaho, Southern Division, together with motions for trial de novo and petitions for interlocutory injunctions in order to stay payments of compensation under the Act. The motions were denied by the United States District Court for the District of Idaho, Southern Division, although the District Judge indicated that he would have ruled differently from that of the Deputy Commissioner.

Thereafter Morrison-Knudsen Company, Inc., appealed the decisions of the United States District Court for the District of Idaho, Southern Division, to the Circuit Court of Appeals for the Ninth Circuit and the Appeals Court affirmed in all respects.

REASONS FOR GRANTING THE WRIT

I

An important question of Federal Law has been decided by the Court below which has not been but should be settled by this Court.

There is a conflict between the decision of the Court below and the Court of Appeals for the Seventh Circuit in *Pittsburgh SS Co. v. Brown*, 171 F. 2d 175 (CA 7th).

The decision of the Court below decides a question of Federal Law which has not been, but should be settled by this Court, namely, "Is the substantial evidence rule, 33 U.S.C.A. 920, applicable to a Deputy Commissioner's finding of Constitutional Jurisdictional Fact under the Longshoremen's and Harbor Workers' Compensation Act or is the losing party (employer) before the Deputy Commissioner entitled to a trial de novo as a matter of right on such facts."

Crowell v. Benson, 285 U.S. 22, teaches that there are both Constitutional and Statutory Jurisdictional Facts prerequisite to the application of the Longshoremen's and Harbor Workers' Compensation Act. That opinion holds that there are two Constitutional Facts prerequisite to the application of the Act, namely, that a master-servant relationship exists and that the injury or death in question occurs on navigable waters of the United States. All other jurisdictional facts, such as course and scope of employment are merely

statutory. The Crowell decision, supra, holds that the substantial evidence rule is applicable to the Deputy Commisioner's finding of statutory jurisdictional facts but leaves open the question as to Constitutional jurisdictional facts:

> "* * * there is no violation of the purpose of Congress in sustaining the determination of fact that the deputy commissioner where he acts within his authority in passing upon compensation claims while denying finality to his conclusions as to the jurisdictional facts upon which the valid application of the statute depends. * * *"

The Court below specifically held that the substantial evidence rule may be constitutionally applied to the Deputy Commissioner's findings of Constitutional Jurisdictional fact. (Occurrence upon navigable waters of the United States) and thereby precludes the losing party's (employer) right to a trial de novo of such fact. The Court below stated:

> "Thus it can be said that as far as this Circuit is concerned the rule laid down in Crowell v. Benson, 285 U.S. 22, has been limited and interpreted so as not to require a trial de novo as a matter of right under the circumstances where there is no real issue of fact presented."

The decision of the Court below is novel and is in conflict with the spirit of Crowell v. Benson, supra. This Court has held many times that the substantial evidence rule may be constitutionally applied to the Deputy Commissioner's finding of statutory facts, but no decision of this Court has ever considered the question of whether the substantial evidence rule may be constitutionally applied to a Deputy Commissioner's findings of constitu-

tional jurisdictional fact. *O'Leary v. Brown Pacific Maxon,* 340 U.S. 504; *Cardillo v. Liberty Mutual Ins. Co.,* 330 U.S. 469; *Parker v. Motorboat Sales Co.,* 314 U.S. 244; *Voehl v. Indemnity Ins. Co.,* 288 U.S. 162.

This question should be decided by this Court in order to assist in the orderly administration of the Longshoremen's and Harborworkers' Compensation Act.

The decision of the Court below is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit in *Pittsburgh SS Co v. Brown,* 171 F. 2d 175 (C.A. 7). In that case the Court of Appeals for the Seventh Circuit affirmed the action of the trial Court in granting the losing party a trial de novo on the question of whether the injury occurred upon navigable waters of the United States. In so holding the Seventh Circuit reviewed *Crowell v. Benson,* supra, and that decision's distinction between constitutional and statutory jurisdictional facts. The Seventh Circuit affirmed the principle that the substantial evidence rule may be applied to the Deputy Commissioner's findings of statutory jurisdicitional fact. However, the Seventh Circuit recognized that the substantial evidence rule may not be applied to a finding of Constitutional jurisdictional facts and that the losing party is entitled to a trial de novo as a matter of right as to such findings. The Seventh Circuit reviewed the long line of cases which have supposedly destroyed the rule in Crowell v. Benson, supra, and noted at page 177:

> "A study of these cases, however, makes it plain that neither of the constitutional jurisdictional questions which the Court considered in the Crowell case was involved."

None of the case relied on by the Court below furnish any substantial basis for the contention that the Crowell case, supra, is no longer binding upon inferior Federal Courts.

Thus a conflict exists between two Circuits involving an important question of Federal Statutory interpretation which should be settled once and for all by this Court.

II

An important question as to the proper interpretation of the Longshoremen's and Harbor Workers' Compensation Act is directly presented: There is a conflict between the decision of the Court below and the Court of Appeals for the Second Circuit in *Jeffers v. Foundation* Co., 85 F. 2d 24. (C.A. 2).

The opinion of the Court below holds that water which seeps from a navigable stream into an unused diversion tunnel used in the construction of a dam across a navigable stream is in itself navigable water of the United States within the meaning of 33 U.S.C.A. 903; that death resulting on those seepage waters is compensable under the Longshoremen's and Harbor Workers' Compensation Act. This decision is in direct conflict with the decision of the Court of Appeals for the Second Circuit in *Jeffers v. Foundation Company,* 85 F. 2d 24 (C.A. 2). In the Jeffers case, supra, a diver was injured by a blast prematurely fired while he was standing either on a ladder or a raft floating upon waters which had seeped into a cofferdam. Cofferdams and caissons had been constructed in order to prepare the foundation of a bridge across the Ohio River

at Pittsburgh, admittedly navigable waters of the United States. A cofferdam had been placed in the river upon a concrete foundation. The base of the cofferdam was below the surface of the river and the top of the cofferdam was above the surface of the river.

The employee left the safety of the cofferdam to set a charge of dynamite in the river and had returned to the interior of the cofferdam when the explosion occurred.

The Court of Appeals for the Second Circuit held that the waters within the cofferdam had been withdrawn from the navigable portions of the Ohio River and no longer formed a part of that river and that therefore the injury to the employee did not occur upon navigable waters of the United States and therefore the Longshoremen's and Harbor Workers' Compensation Act was inapplicable; accord *American Red Cross v. Henson*, 122 S.W. 2d 433.

The waters in the cofferdam obviously did not meet the test of navigability laid down in the *Daniel Ball*, 770 U.S. 557, and *United States v. Appalachian Electric Power Co.*, 311 U.S. 377.

The waters that had leaked into the unused diversion tunnel from the Snake River did not "form in their ordinary condition by themselves, or by uniting with other waters a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary mode in which such commerce is conducted by water" as required by the decisions in the Daniel Ball and United States v. Appalachian Power Co., supra.

A conflict exists between the decision of the Court below and the decision of the Court of Appeals for the Second Circuit in the Jeffers case, supra. The fact parallels between the two cases are obvious. An important question of Federal Statutory interpretation exists which should to settled once and for all by this Court, namely: Whether withdrawn seepage waters from a navigable stream should or should not be treated as navigable waters of the United States for the purpose of the application of the Longshoremen's and Harbor Workers' Compensation Act.

III

An important question as to the proper interpretation of the Longshoremen's and Harbor Workers' Compensation Act is directly presented: There is a possible conflict between the decision of the Court below and the Court of Appeals for the Eighth Circuit in *Massman Construction* Co. v. *Bassett*, 120 F. 2d 230 (C.A. 8), certiorari denied 314 U.S. 648.

Dam construction on the navigable streams of the United States is of considerable importance to the entire country and to the various States and contractors who are concerned or engaged in such construction. This is particularly so in the Pacific Northwest.

The decision of the Court below concludes that employees engaged in the construction of a dam who are required to investigate seepage waters in an unused diversion tunnel are engaged in maritime employment. According to the Court below workers engaged in such

work are within the purview of the provisions of the Longshoremen's and Harbor Workers' Compensation Act. This decision is in conflict with the decision of the Court of Appeals for the Eighth Circuit in *Massman Construction Co. v. Bassett*, 30 F.S. 813, 120 F. 2d 230 (C.A. 8), Certiorari denied, 314 U.S. 648.

In the Massman case, supra, decedent received fatal injuries while standing in the bottom of a cofferdam erected in aid of the construction of a dam in navigable waters. A decree was entered enjoining enforcement of the Deputy Commissioner's award for the reason that at the time of the decedent's injuries he was not engaged in maritime employment upon navigable waters of the United States. 30 F. Supp. 813. The Court of Appeals for the Eighth Circuit reversed for jurisdictional reasons admittedly not considering the essential constitutional jurisdictional fact as to navigable waters of the United States as considered by the trial Court and found to be wanting.

For a similar decision to the effect that the construction of a dam in navigable waters of the United States is not maritime employment see *Central Engineering Co. v. Bassett* (D.C. Ill. 1941), 42 F. Supp. 750.

The decision of the Court below is in direct conflict with the *Massman* and *Central Engineering Co.* cases and an important federal question is raised which should be settled once and for all by this Court, namely: Whether drownings of ironworkers, on seepage water from a navigable stream, in an unused diversion tunnel are compensable under the Longshoremen's and Harbor Workers' Compensation Act.

CONCLUSION

The questions presented are of considerable importance and will undoubtedly be precedents in many other Longshoremen's and Harbor Workers' Compensation Act cases involving dam construction.

The decision of the Court below makes a nullity of the provision of 33 U.S.C.A. 903(a) reading:

> "* * * and if recovery for disability of death through Workmen's Compensation proceedings may not be provided by State law."

The employer, Morrison-Knudsen Company, Inc., has a constitutional right of trial de novo on the constitutional jurisdictional fact of whether or not the deaths occurred on navigable waters of the United States. Seepage waters into an unused diversion tunnel are not navigable waters of the United States as a matter of law and ironworkers who may sustain injury or death while working on such seepage waters are not engaged in maritime employment so as to come within the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

To resolve the conflict between the various Court of Appeals and to furnish an authoritative guide for future anticipated litigation involving the same questions, this petition for writ of certeriorari should be granted.

Respectfully submitted,

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Portland 4, Oregon,
Attorney for Petitioner.

APPENDIX A

OPINION OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16896 – MARCH 20, 1961 – WOLLENBERG, DISTRICT JUDGE

This case involves the death of four workmen employed by appellant in the construction of the Brownlee Dam on the Snake River, which at the point of construction runs between the states of Idaho and Oregon. The dam construction was authorized by the Federal Power Commission "in the interest of navigation".

During construction a diversion tunnel was constructed; this tunnel took the entire flow of the Snake River from its normal channel and carried it around the dam site during the period of construction of the dam itself. This tunnel, for several months, was the actual bed of the stream. Later, gates with open grilles were placed at the upstream entrance of the tunnel to allow a portion of the water to flow to the dam, and thus build up a pool behind the dam, at the same time allowing a portion of the water to go into the river via the tunnel, and thus maintain the downstream flow of the Snake River. This continued until the level of water behind the dam became sufficiently high so that the required water could pass downstream via the spillway of the dam. When this occurred the appellant attempted to close the tunnel flow of water by blocking off the grilles at the tunnel entrance by dumping rock and fill. This process of dumping was eventually designed to close off the entire flow of water into the tunnel. At the time of the deaths, approximately

one-twentieth of the entire river water continued to flow into the tunnel by seeping through the rock fill.

The four deceased workmen had entered the diversion tunnel in a boat to accomplish work eventually designed to effect a complete closing off of the flow of all waters into the tunnel. It was while engaged in this work that the four workmen lost their lives by drowning.

The deputy commissioner, on these facts, after hearing awarded payments under the Longshoremen's and Harbor Workers' Compensation Act to the claimants. He specifically found the deaths arose out of the workers' employment, that a portion of the Snake River, a navigable body of water, was flowing through the diversion tunnel at the time of the accident, that appellant contractors used a number of boats during construction of the dam, and that the claims herein were timely filed. The appellant then filed in the United States District Court for the District of Idaho a "Petition for Injunction". This petition sought a decree holding the commissioner's compensation order unlawful, and setting it aside, and enjoining its enforcement. The United States District Court denied a motion for a trial de novo and denied the relief sought, affirming the award of the deputy commissioner as supported by substantial evidence.

(1) Appellant contends that the trial court erred in denying it a trial de novo.

It agrees that the record before the deputy commissioner is complete and contains all of the evidence that could be adduced at any hearing on this case; in other words, a de novo hearing before the reviewing court would

have produced no more factually than the court had before it in the record of hearing before the deputy commissioner. There is, therefore, no showing that any worthwhile purpose would have been served by a hearing de novo in the district court on review of the commissioner's order.

This court has on two occasions refused to require de novo hearings on review, and in each case has refused to distinguish between questions of fact that may be said to be "fundamental" or "jurisdictional". Thus it can be said that as far as this Circuit is concerned the rule laid down in *Crowell v. Benson,* 285 U.S. 22, has been limited and interpreted so as not to require a trial de novo as a matter of right under circumstances where there is no real issue of fact presented. Rather, this court has consistently held that where no worthwhile purpose would be served, the substantial evidence rule should be applied, and if there is such evidence upon which to sustain the deputy commissioner's findings, his conclusions should be sustained. Clearly, there is no showing under the present modern authorities that appellant was entitled to a hearing de novo as a matter of right under the circumstances herein.

> *O'Leary v. Dielschneider,* 204 F.2d 810 (C.C.A. 9); *Western Boat Building Co. v. O'Leary,* 198 F.2d 409 (C.C.A. 9).

The District Judge adopted, and we believe correctly, the substantial evidence rule, and reviewed the record before the deputy commissioner. This he had a right to do, and clearly he committed no error in proceeding to a determination of the issues upon that record without a de novo trial.

(2) It is contended by appellant that the court erred in holding that the employees' deaths resulted from injuries occurring upon navigable waters of the United States, and were thus subject to the Longshoremen's and Harbor Workers' Compensation Act.

There can be no doubt, from a reading of the record herein, that the waters of the Snake River are navigable waters. The facts disclose that the purpose of the tunnel in question was to accommodate these waters during the construction of the dam; that for a period of many months all of the waters of the Snake River flowed through the tunnel, and thus the tunnel became the stream bed of the river. At the time of the accident, although an attempt had been made to prevent the flow of any of the water from the river into the tunnel, yet a considerable amount of this river flowed into the tunnel as leakage. This did not change the navigable nature of the waters in the tunnel; man made works, although artificial, have not, under these facts, changed the character of the waters of the Snake River, and particularly the character of the water in the diversion tunnel; the waters in the tunnel were at the time of the accident navigable waters of the Snake River.

(3) Appellant contends that there is nothing in the evidence remotely connected with maritime employment, which would make the deaths compensable under the Longshoremen's and Harbor Workers' Compensation Act.

The deaths occurred on navigable waters, i.e., the Snake River, at a time that the deceased dam workers were operating a boat on these waters. The appellant

was constructing the dam, on the navigable Snake River, under an authorization from the Federal Power Commission "in the interest of navigation". The fact that the deceased were dam workers is not determinative herein; these men, under the facts, were engaged in a pursuit directly concerned with a maritime purpose; they were concerned, as was their employer, with an occupation directly affecting the flow of navigable waters of the Snake River. At the time of their deaths they were engaged in a maritime pursuit on navigable waters of the United States. The work they were doing, from a boat floating on waters of the Snake River, at the time of their deaths, directly concerned the flow of the waters of the river, i.e., navigable waters, to prevent seepage into the tunnel of waters from a navigable stream. The tunnel in which they were working had some months before carried all the waters of this stream, and during this period was the main stream bed. At the time of the deaths, it still carried a portion of these waters, and it was this fact that necessitated the presence of the workers in the tunnel in order that the tunnel be plugged and all of the water of the stream be returned to a single channel.

Under the facts herein, at the specific time and place both employer and employees were engaged in maritime employment.

This conclusion of the deputy commissioner is adequately sustained in the record by substantial evidence, and the District Judge so found. The fact that the evidence may have supported a contrary finding, or that the weight of the evidence may be contra, is not sufficient

to overcome the substantial evidence rule as applied by the District Judge. *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251.

It is therefore ordered:

(1) That judgment of the United States District Court be affirmed.

(2) That counsel fees for services on this appeal be paid to Bailey, Lezak, Swink and Gates, of Portland, Oregon, attorneys for intervenor, in the sum of $150.00, to be paid from the award to claimants herein.

(Endorsed) Opinion Filed March 20, 1961.

Frank H. Schmid, Clerk.

APPENDIX B

OPINION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO – SOUTHERN DIVISION MARCH 21, 1960 – CLARK, DISTRICT JUDGE

THE COURT: I have hastily drawn a little memorandum.

It cannot be questioned that the Snake River itself is a navigable stream and the waters of the Snake River are navigable waters of the United States.

In a proceeding such as this for compensation under the Longshoremen and Harbor Workers Compensation Act the Court is to accept the findings of the Deputy Commissioner unless they are unsupported by substantial evidence on the record considered as a whole.

Although I might say that I don't agree with the conclusions reached by the Commissioner, nevertheless he was the fact finder and I will sustain his decision.

I feel that this action has been instituted on reasonable grounds and costs will not be allowed.

APPENDIX C

BUREAU OF EMPLOYEES' COMPENSATION
U. S. DEPARTMENT OF LABOR

FOURTEENTH COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act
DANA M. EMIG (RICHARD B. EMIG, DECEASED),
Claimant,

vs.

MORRISON-KNUDSEN COMPANY, INCORPORATED,
Uninsured Employer.

COMPENSATION ORDER
AWARD OF DEATH BENEFITS

CASE NO. 1793-4

Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT

That on the 22nd day of July, 1958, the deceased above named was in the employ of the employer above named at Brownlee Dam located in the Snake River, a navigable body of water between the States of Idaho and Oregon, in the Fourteenth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was un-

insured; that in connection with the construction of the Brownlee Dam it was necessary for the employer to divert the flow of the Snake River away from the dam site and for this purpose the employer constructed a diversion tunnel through which the Snake River flowed while the Brownlee Dam was being constructed; that after the dam was completed a portion of the Snake River continued to flow through the diversion tunnel and on July 22, 1958 the deceased and three other employees who were performing service as iron workers for the employer were directed to proceed into the tunnel and attach certain brackets to the wall of the upper end of the tunnel to aid in sealing off the tunnel so that it would no longer carry a portion of the flow of the Snake River; that the deceased and the three other employees proceeded into the diversion tunnel in a 16-foot boat which was propelled by an outboard motor; that while the deceased and the three other employees were in the tunnel the boat in which they were riding was broken up in consequence of which the deceased and his three fellow employees were drowned; that the death of the deceased arose out of and in the course of his employment by the employer above named; that during the construction of the Brownlee Dam the employer operated 10 to 12 boats propelled by outboard motors and similar in size to the boat in which the deceased was a passenger on the date of his death; that these boats were used to transport employees of the employer across the Snake River and in various other activities; that in addition to these boats the employer also operated a tug boat about 33 or 34 feet in length which was used in connection with the construc-

tion of a fish net some distance upstream from the dam site; that written notice of death was not given within 30 days but that the employer had knowledge of the death and was not prejudiced by the lack of such written notice; that a claim for death benefits was not filed by the claimant herein within one year after the date of the death of the deceased but since the employer has failed to submit a report of the death in accordance with the provisions of Section 30 (a) of the Act, the time limitation for the filing of a claim in subdivision (a) of Section 13 of the Act did not begin to run against the claim of the claimant herein and her claim for death benefits filed May 26, 1959 was timely filed; that the average weekly wage of the deceased employee at the time of his death is admitted to have exceeded $81.00; that the claimant, Dana M. Emig, who was born on September 14, 1925 and married to the deceased on January 1, 1946 is the surviving wife of the deceased and as such is entitled to death benefits for her support at the rate of $28.35 per week; that Susan Marie Emig, who was born on February 12, 1949, and Kristine Marie Emig, who was born on January 26, 1955, are the surviving children of the deceased and as such are entitled to death benefits at the rate of $12.15 each per week; that said death benefits are payable to Dana M. Emig as Mother and natural guardian of said surviving children; that the accrued death benefits to which the claimant, Dana M. Emig, is entitled to for her support and for the support of said surviving children from July 23, 1958 to January 26, 1960, inclusive, a period of 79 weeks at $52.65 per week, amount to $4,159.35; that the claimant has paid $1,289.65 as funeral

expenses of the deceased and she is entitled to reimbursement in the amount of $400.00 as reasonable funeral expenses; that the employer is entitled to credit for any amounts heretofore paid to the claimant as death benefits or reimbursement of funeral expenses in accordance with the provisions of the Idaho Workmen's Compensation Law.

Upon the foregoing facts the Deputy Commissioner makes the following

AWARD

That the employer, Morrison-Knudsen Company, Incorporated, shall pay to the claimant, Dana M. Emig, death benefits for her support, and for the support of Susan Marie and Kristine Marie Emig, surviving children of the deceased as follows: 79 weeks at $52.65 per week in the amount of $4,159.35 from July 23, 1958 to January 26, 1960, inclusive, which amount the employer is directed to pay forthwith in one sum (less any payments of death benefits heretofore made by the employer in accordance with the provisions of the Idaho Workmen's Compensation Law and also less attorneys' fees hereinafter provided for) and shall thereafter continue payments of death benefits to Dana M. Emig at the rate of $52.65 per week for her support and for the support of said surviving children in bi-weekly instalments subject to the limitations of the Act or until otherwise ordered. The employer shall also reimburse the claimant, Dana M. Emig, for reasonable funeral expenses of the deceased in the amount of $400.00 (less any payment of funeral

expenses heretofore paid by the employer). A fee in the amount of $500.00 is hereby approved in favor of Bailey, Lezak, Swink and Gates, Attorneys at Law, 617 Corbett Building, Portland 4, Oregon, for services rendered the claimant in the presentation of her claim for death benefits, the same to constitute a lien upon and be payable from this award.

Given under my hand at Seattle, Washington, this 26th day of January, 1960.

J. J. O'LEARY,
Deputy Commissioner,
Fourteenth Compensation District.

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

FOURTEENTH COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act
DANA M. EMIG (RICHARD B. EMIG, DECEASED),
Claimant,

VS.

MORRISON-KNUDSEN COMPANY, INCORPORATED,
Uninsured Employer.

SUPPLEMENTAL COMPENSATION ORDER
CORRECTING COMPENSATION ORDER FILED JANUARY 26, 1960
CASE NO. 1793-4

Upon his own initiative, because of a mistake in a determination of fact by the Deputy Commissioner, the Deputy Commissioner has reviewed the compensation

order filed in the above entitled case on January 26, 1960 and finds that the following **FINDING OF FACT** contained in said compensation order was incorrect; "that a claim for death benefits was not filed by the claimant herein within one year after the date of the death of the deceased but since the employer has failed to submit a report of the death in accordance with the provisions of Section 30 (a) of the Act, the time limitation for the filing of a claim in subdivision (a) of Section 13 of the Act did not begin to run against the claim of the claimant herein and her claim for death benefits filed May 26, 1959 was timely filed"; accordingly, — the above **FINDING OF FACT** in said compensation order is hereby deleted and the following **FINDING OF FACT** is substituted in lieu thereof: — "that the claim for death benefits filed by the claimant herein on May 26, 1959 was filed within one year after the date of the death of the deceased."

Given under my hand at Seattle, Washington, this 20th day of January, 1960.

J. J. O'LEARY,
Deputy Commissioner,
Fourteenth Compensation District.